A

CIMB Bank Bhd (formerly known as Bumiputra-Commerce Bank Bhd) v Sivakadatcham a/l P Sethuram Vandayar

B

HIGH COURT (PULAU PINANG) — ORIGINATING SUMMONS NO PA-24FC-375–07 OF 2017
AZMI ABDULLAH JC
1 JUNE 2018

C

Land Law — Order for sale — Application to set aside the order for sale — Existence of 'cause to the contrary' — Whether O 28 r 3(c)(3) of the Rules of Court 2012 applicable — Whether 12 years limitation period started from date when defendant defaulted in servicing loan or from date when Form 16D was issued — Whether submission on wrongful calculation of interest relevant — Whether there was a breach of O 7 r 3(1) of the Rules of Court 2012 — Whether there was a short service of four clear days pursuant to O 83 r 3 of the Rules of Court 2012 — Holidays Act 1951 s 2 — Interpretation Acts 1948 and 1967 s 3 — Limitation Act 1953 s 21 — National Land Code s 256(3) — Rules of Court 2012 O 7 r 3(1), O 28 r 3C(3) & O 83 r 3

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E

This was an application by the defendant to set aside the order for sale under s 256(3) of the National Land Code ('the NLC') that was granted after the defendant failed to appear after the originating summons and affidavit in support filed by the plaintiff was served on the plaintiff. The issues for determination were: (a) whether O 28 r 3C(3) of the Rules of Court 2012 ('the ROC') was applicable; (b) whether the 12 year limitation period started from the date when the defendant first defaulted in servicing the loan or from the date when the Form 16D was issued; (c) whether the purported wrongful calculation of interest was relevant; (d) whether there was a breach of O 7 r 3(1) of the ROC; and (e) whether there was a short service of four clear days pursuant to O 83 r 3 of the ROC.

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Held, dismissing the defendant's application with costs of RM3,000:

H

(1) As this was an application for an order for sale under s 256(3) of the NLC, unless the honourable court was satisfied of the existence of 'cause to the contrary', an order for sale was mandatory. The burden of proving that there was cause to the contrary lay on the defendant (see para 5).

I

(2) Order 28 r 3(C)(3) of the ROC had no legal obligation to an action filed pursuant to O 83 of the ROC. The party served with the OS had the option of whether to adduce evidence to contest the plaintiff's application. The order did not stipulate a mandatory requirement for the defendant to be given a period of 21 days to reply. It did not impose that

the plaintiff shall wait 21 days upon serving the OS to ensure that the defendant had the intention to answer/contest /reply before obtaining an order for sale (see paras 7–10).

(3) Pursuant to s 21 of the Limitation Act 1953, for an action for recovery of money which was secured by a charge, the limitation was 12 years. Pursuant to s 254 of the NLC, the cause of action accrued from the expiry of 30 days notice under Form 16D or such alternative period as may be specified in the charge. In the present case, the court was of the view that the cause of action accrued on 12 August 2015 being the date of Form 16D and not from the date when the defendant first defaulted in servicing the bank loan let alone from the last date the defendant had paid his last instalment. Hence the 12 years period had not been exceeded (see paras 11–13).

(4) The defendant's argument on the purported wrongful calculation of interest was baseless and without merit. It is settled law that any categories which are not within the restrictive categories of 'cause to the contrary' should not be taken into consideration by the court (see paras 19–20).

(5) The plaintiff had fulfilled the requirements enunciated in O 7 r 3(1) of the ROC to which the plaintiff had sufficiently identified the cause of action and also relief or remedy which the plaintiff was seeking before the court (see para 23).

(6) In computing the four clear days rule stipulated under O 83 r 2 of the ROC, only the weekly holiday (Sunday) shall be excluded. Saturday was not a weekly holiday and this finding was supported by s 2 of the Holidays Act 1951 and s 3 of the Interpretation Acts 1948 and 1967. Upon that premise, the court found that the service of the plaintiff's originating summons and affidavit in support on the defendant was well within the four clear days rules since service was carried out/perfected on 25 August 2017 (Friday) with the order for sale being obtained on 5 September 2017, hence the calculation of four clear days shall start to run from 26 August 2017 (Saturday), 28 August 2017 (Monday), 29 August 2017 (Tuesday), 30 August 2017 (Wednesday) and 2 September 2017 (Saturday). Two Sundays being 27 August 2017 and 3 September 2017, 31 August 2017 (National Day), 1 September 2017 (Hari Raya Haji) and 4 September 2017 (SEA Games winning holiday) being excluded from calculation (see paras 31–32 & 34).

(7) The court was satisfied that the defendant had failed to demonstrate any cause to the contrary as stipulated in s 256(3) of the NLC (see para 39).

[Bahasa Malaysia summary

Ini merupakan satu permohonan oleh defendan untuk membatalkan perintah untuk menjual di bawah s 256(3) Kanun Tanah Negara ('KTN') yang diberikan selepas defendan gagal untuk hadir selepas saman pemula dan afidavit sokongan yang difailkan oleh plaintif diserahkan kepada plaintif. Isu untuk diputuskan adalah: (a) sama ada A 3C(3) k 28 Kaedah-Kaedah Mahkamah 2012 ('KKM') terpakai; (b) sama ada tempoh had masa 12 tahun bermula dari tarikh defendan mula-mula memungkiri dalam membayar pinjaman atau dari tarikh apabila Borang 16D dikeluarkan; (c) sama ada kesilapan pengkiraan faedah yang dikatakan berlaku adalah relevan; (d) sama ada wujud pelanggaran A 3(1) k 7 KKM; dan (e) sama ada wujud penyerahan singkat empat hari selaras dengan A 3 k 83 KKM.

Diputuskan, mengetepikan permohonan defendan dengan kos RM3,000:

(1) Memandangkan ini merupakan satu permohonan untuk perintah penjualan di bawah s 253(3) KTN, kecuali mana mahkamah ini berpuas hati dengan kewujudan 'sebab yang sebaliknya', satu perintah untuk menjual adalah wajib. Beban untuk membuktikan bahawa wujud sebab yang sebaliknya terletak pada defendan (lihat perenggan 5).

(2) Aturan 3(c)(3) k 28 KKM menyebabkan tiada tanggungjawab undang-undang dalam satu tindakan yang difailkan di bawah A 83 KKM. Pihak yang diserahkan dengan saman pemula mempunyai pilihan sama ada untuk mengemukakan keterangan untuk mencabar permohonan plaintif. Kaedah tersebut tidak menetapkan keperluan wajib untuk defendan diberikan tempoh masa 21 hari untuk membalas. Ianya tidak menetapkan bahawa plaintif perlu menunggu 21 hari selepas penyerahan saman pemula untuk memastikan bahawa defendan berniat untuk menjawab/mencabar/membalas sebelum mendapatkan perintah untuk menjual (lihat perenggan 7–10).

(3) Selaras dengan s 21 Akta Had Masa 1953, satu tindakan untuk mendapat kembali wang yang bercagar, tempoh had masa adalah 12 tahun. Selaras dengan s 254 KTN, kausa tindakan bermula dari penamatan notis 30 hari di bawah Borang 16D atau satu tempoh masa lain yang boleh dikhususkan dalam cagaran. Dalam kes ini, mahkamah berpendapat bahawa kausa tindakan bermula pada 12 Ogos 2015 iaitu tarikh Borang 16D dan bukannya tarikh defendan pada mulanya mungkir dalam membayar pinjaman bank apalagi dari tarikh terakhir defendan telah membayar ansuran terakhirnya. Oleh itu tempoh masa 12 tahun masih belum di lebihi (lihat perenggan 11–13).

(4) Hujahan defendan berkenaan dengan kesilapan pengiraan faedah adalah tidak berasa dan tanpa merit. Adalah menjadi undang-undang mantap bahawa apa-apa kategori yang tidak di bawah kategori terhad 'sebab yang

sebaliknya' tidak boleh di ambil kira oleh mahkamah (lihat perenggan 19–20).

(5) Plaintif telah memenuhi keperluan yang dinyatakan dalam A 3(1) k 7 KKM yang mana plaintif telah dengan mencukupi mengenal pasti kausa tindakan dan juga relif atau remedi yang plaintif sedang memohon dari mahkamah (see para 23).

(6) Dalam mengira peraturan empat hari yang dinyatakan di bawah A 2 k 83 KKM, hanya cuti umum (Ahad) akan dikecualikan. Sabtu bukanlah satu hari cuti mingguan dan dapatan ini disokong oleh s 2 Akta Cuti 1951 dan s 3 Akta Tafsiran 1948 dan 1967. Berdasarkan premis tersebut, mahkamah mendapati bahawa penyerahan saman pemula dan afidavit sokongan plaintif adalah dalam peraturan empat hari memandangkan penyerahan dibuat/dilengkapkan pada 25 Ogos 2017, oleh itu pengiraan empat hari akan bermula daripada 26 Ogos 2017 (Sabtu), 28 Ogos 2017 (Isnin), 29 Ogos 2017 (Selasa), 30 Ogos 2017 (Rabu) dan 2 September 2017 (Sabtu). Dua hari Ahad iaitu 27 Ogos 2017 dan 3 Septemper 2017, 31 Ogos 2017 (Hari Merdeka), 1 September 2017 (Hari Raya Haji) dan 4 September 2017 (cuti kemenangan sukan SEA) dikecualikan dari pengiraan (lihat perenggan 31–32 & 34).

(7) Mahkamah berpuas hati bahawa defendan gagal untuk menunjukan apa-apa sebab yang sebaliknya sepertimana dinyatakan dalam s 256(3) KTN (lihat perenggan 39).]

Notes

For a case on order for sale in general, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) para 4345.

Cases referred to

Aje Best-On Sdn Bhd v Ahmad bin Omar & Anor [2000] 4 MLJ 600; [2000] 3 CLJ 515, HC (refd)

Chain Cycle Sdn Bhd v Government of Malaysia [2015] 9 MLJ 214; [2014] 10 CLJ 196, HC (refd)

Jigarlal K Doshi @ Jigarlal a/l Kantilal Doshi v Resolution Alliance Sdn Bhd and another appeal [2013] 3 MLJ 61; [2012] 1 LNS 811, CA (folld)

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77, SC (refd)

MBf Finance Berhad v Tiong Kieng Seng [2001] MLJU 405; [2001] 4 CLJ 38, HC (refd)

Peh Lai Huat v MBf Finance Bhd [2011] 3 MLJ 470; [2009] 5 CLJ 69, HC (refd)

Perwira Affin Bank Bhd v Lim Weow [1998] 3 MLJ 56; [1998] 4 CLJ 17, CA (refd)

Southeast Asia Special Asset Management Berhad v Latchamanan a/l Sinnakannoo [2017] MLJU 533; [2017] 1 LNS 1171, HC (refd)

Legislation referred to

Holidays Act 1951 s 2
Interpretation Acts 1948 and 1967 ss 3, 12
Limitation Act 1953 s 21
National Land Code ss 254, 256(3), Form 16D
Rules of Court 2012 O 2 r 1, O 7 r 3(1), O 10 r 3, O 28 r 3C(3), O 83, O 83 rr 2, 2(2), 3

TY Chung (Khor, Ong & Co) for the plaintiff.
M Kanesan (M Kanesan & Assoc) for the defendant.

Azmi Abdullah JC:

INTRODUCTION

[1] The plaintiff filed an originating summons (encl 1) and affidavit in support for an order for sale against the defendant and the originating summons and affidavit in support was served on the defendant. The failure of the defendant to appear in court on 5 September 2017 has resulted in the granting of an order for sale by this honourable court against the defendant.

[2] The sealed order for sale (encl 5) was then served on the defendant on 29 September 2017 as reflected by exh BYL2 *afidavit balasan* of Bok Yoke Lan which was duly affirmed on 14 November 2017.

[3] The following affidavits were filed herein and deliberated pertaining to encl 6 filed by the defendant to set aside the order for sale granted:

(a) the defendant's affidavit in support affirmed on 10 October 2017 ('the defendant's affidavit in support');

(b) the plaintiff's affidavit in reply affirmed on 14 November 2017 ('the plaintiff's affidavit in reply');

(c) the defendant's affidavit in reply affirmed on 6 December 2017 ('the defendant's affidavit in reply'); and

(d) the plaintiff's affidavit in reply affirmed on 18 December 2017 ('the plaintiff's affidavit in reply (1)').

[4] This court after perusing the written submissions forwarded to court by counsels for the plaintiff and defendant and allowing oral clarifications to be made by the counsels concerned, decided on 27 March 2017 to dismiss the defendant's application. Dissatisfied with the decision made, the defendant has filed an appeal to the Court of Appeal against the said decision hence the grounds of judgment hereby prepared.

RELEVANT PROVISIONS OF THE LAW

[5] As this is an application for an order for sale under s 256(3) of the National Land Code, unless this honourable court is satisfied of the existence of 'cause to the contrary', an order for sale is mandatory. The burden of proving that there is cause to the contrary lies on the defendant.

[6] It is settled law that in a foreclosure action, this honourable court would only be concerned with those three categories of 'cause to the contrary' as laid down by the Federal Court in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 which has articulated and explained with such precision as to what tantamount to 'cause to the contrary':

> [3] A chargor may show cause to the contrary under s 256(3) of the Code: *(i) by demonstrating that the charge is defeasible upon one or more of the grounds specified under subsections (2) and (4)(b) of the said s 256; (ii) by demonstrating that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale, such as failure to make a demand or service of a notice in Form 16D, or that the notice demands sums not lawfully due from the charge; and (iii) by demonstrating that its grant would be contrary to some rule of law or equity*.

ISSUES RAISED BY THE DEFENDANT

Whether O 28 r 3C(3) of the Rules of Court 2012 is applicable

[7] This court finds that O 28 r 3C(3) of the Rules of Court 2012 has no legal application to an action filed pursuant to O 83 of the Rules of Court 2012 such as this. The latest precedent of *Southeast Asia Special Asset Management Berhad v Latchamanan a/l Sinnakannoo* [2017] MLJU 533; [2017] 1 LNS 1171 whereby the learned High Court judge has decided on this issue by stating that:

> [117] In this regard, the defendant complains that there is 'short service' as O 28 r 3C(3) of the ROC has not been complied with as the defendant was not given '21 days' to file affidavit in reply. But, under O 83 r 2(2) of the ROC, all that the plaintiff has to do is to ensure that the cause papers are served no less than four clear days before the hearing of the OS. I find that for an action to enforce a charge under O 83 of the ROC, there is no requirement for the OS to be served 21 days prior to the hearing date of the OS.

[8] Hence from a reading of the order, the party served with the OS has the option of whether to adduce evidence to contest the plaintiff's application as this is gathered from the phrase 'where the defendant intends to adduce evidence'. The use of the word intends reflects that the defendant is given the choice whether to reply to the plaintiff's affidavit in support or not.

[9] The plaintiff is not allowing 21 days to pass, has not denied the defendant a mandatory night to reply. The mandatory requirement applies to two instances:

(a) if the defendant intends to reply to the plaintif's affidavit in support, the defendant has to do by way of an affidavit; and

(b) the affidavit has to be filed and served on the plaintiff in a period not exceeding 21 days after receipt of the plaintiff's affidavit in support.

[10] This court finds that the order does not stipulate a mandatory requirement for the defendant to be given a period of 21 days to reply. It also does not impose that the plaintiff shall wait 21 days upon serving of the OS to ensure that the defendant has the intention to answer/contest/reply before obtaining an order for sale.

Whether the 12 year period ('limitation period') starts from the date when the defendant first defaulted in servicing the loan or from the date when the Form 16D is issued

[11] Pursuant to s 21 of the Limitation Act 1953, this honourable court is satisfied that for an action for recovery of money which is secured by a charge, the limitation period is 12 years:

(1) *No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued.*

(2) No foreclosure action in respect of mortgaged personal property shall be brought after the expiration of twelve years from the date on which the right to foreclose accrued:
Provided that if, after that date the mortgagee was in possession of the mortgaged property, the right to foreclose on the property which was in his possession shall not, for the purposes of this subsection, be deemed to have accrued until the date on which his possession discontinued.

(3) The right to receive any principal sum of money secured by a mortgage or other charge and the right to foreclose on the property subject to the mortgage or charge shall not be deemed to accrue so long as that property comprises any future interests or any life insurance policy which has not matured or been determined.

(4) Nothing in the preceding subsections of this section shall apply to a foreclosure action in respect of mortgaged land but the provisions of this Act relating to actions to recover land shall apply to such an action.

(5) No action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or other charge or payable in respect of

proceeds of the sale of land, or to recover damages in respect of such arrears shall be brought after the expiration of six years from the date on which the interest became due:
Provided that —

(a) where a prior mortgagee or other incumbrancer has been in possession of the property mortgaged or charged, and an action is brought within one year of the discontinuance of such possession by the subsequent incumbrancer he may recover by that action all the arrears of interest which fell due during the period of possession by the prior incumbrancer or damages in respect thereof, notwithstanding that the period exceeded six years;

(b) where the property subject to the mortgage or charge comprises any future interest or life insurance policy and it is a term of the mortgage or charge that arrears of interest shall be treated as part of the principal sum of money secured by the mortgage or charge, interest shall not be deemed to become due before the right to receive the principal sum of money has accrued or is deemed to have accrued.

(6) This section shall not apply to any mortgage or charge of a ship.

[12] Pursuant to s 254 of the National Land Code, the cause of action accrued from the expiry of 30 days notice under the Form 16D or such alternative period as may be specified in the charge. The argument forwarded by the defendant in his defendant's affidavit in support, in particular paras 15 and 17 which are reproduced below in its original language, is baseless and without merit.

15. Berkenaan dengan perenggan-perenggan 9, 10, 11 dan 12, Afidavit Sokongan tersebut, secara ringkas saya menegaskan seperti berikut:

(a) Sebelum ini, Plaintif telah memfailkan satu tindakan halang tebus terhadap Hartanah tersebut di bawah Saman Pemula No 31-191-87 yang difailkan di dalam Mahkamah Yang Mulia lni di mana saya telah melantik Encik SP Annamalai dari Tn Annamalai & Co untuk bertindak bagi pihak saya.

(b) Menurut beberapa perundingan yang diadakan di antara Encik SP Annamalai dan Plaintif, Plaintif telah memberi cadangan untuk saya membayar jumlah sebanyak sedikit lebih daripada RM 200,000-00 sebagai penyelesaian penuh perkara ini.

(c) Encik SP Annamalai telah terus merunding dengan Plaintif dan berjaya mencapai satu penyelesaian untuk membayar sedikit kurang daripada RM 200,000-00 sebagai penyelesaian penuh perkara ini.

(d) Menurut penyelesaian tersebut, saya telah pun membayar jumlah penyelesaian tersebut kepada Encik SP Annamalai untuk membuat bayaran kepada Plaintif.

(e) Mengikutnya, saya sesungguhnya mempercayai bahawa Plaintif telah menarik balik Saman Pemula Pertama tersebut.

(f) Selepas itu, tiada tindakan lagi diambil oleh Plaintif dan malangnya Encik SP Annamalai tersebut telah pun meninggal dunia.

(g) Tiba-tiba, melalui peguamcara mereka Tn Khor, Ong & Company, Plaintif telah mengeluarkan satu Notis Tuntutan bertarikh 06-03-2014 terhadap saya yang mananya telah pun dijawab melalui surat saya bertarikh 18-03-2014. Akan tetapi saya tidak menerima apa-apa jawapan daripada peguamcara tersebut. Setiap Notis Tuntutan tersebut dan surat saya tersebut dilampirkan dengan ini sebagai Ekshibit 'C'.

(h) Seterusnya melalui surat bertarikh 08-05-2014, bekas peguamcara saya, Tn Karuppiah & Co telah menulis kepada Tn. Khor, Ong & Company di mana tuntutan Plaintif telah dinafikan dan seterusnya memberitahu mereka bahawa saya telah melantik bekas peguamcara saya tersebut dan mereka bersedia untuk menerima sebarang kertas kausa bagi pihak saya. Akan tetapi surat bertarikh tersebut langsung tidak dijawab, sesalinannya dilampirkan dengan ini sebagai Ekshibit 'D'.

(i) Selepas lebih dari setahun kemudian saya telah menerima satu lagi Notis Tuntutan bertarikh 18-06-2015 yang dirujuk di perenggan 9, Afidavit Sokongan tersebut, sesalinannya dilampirkan sebagai Ekshibit 'D' di situ.

(j) Bagaimana pun, Notis Tuntutan tersebut telah pun dijawab melalui surat saya di mana tuntutan Plaintif telah dinafikan. Akan tetapi surat saya tersebut langsung tidak dijawab o/eh Plaintif atau pun peguamcaranya. Sesalinan surat saya tersebut dilampirkan dengan ini sebagai Ekshbit 'E'.

(k) Seterusnya, saya menerima Notis Statutori bertarikh 12-08-2015 yang dirujuk di perenggan 10, Afidavit Sokongan tersebut, sesalinannya dilampirkan sebagai Ekshibit 'E' di situ.

(l) Selepas itu saya tidak menerima apa-apa surat daripada Plaintif atau peguam mereka sehingga saya menerima Saman Pemula tersebut dan Afidavit Sokongan tersebut pada 5-9-2017.

(m) Dalam keadaan demikian, saya menafikan perenggan 12, Afidavit Sokongan tersebut dan penyata akaun yang dirujuk dan dilampirkan sebagai Ekshibit 'F' di situ di mana dikatakan bahawa setakat 5-9-2017, saya berhutang wang sebanyak RM 685,015-12 kepada Plaintif

17. Selanjutnya, mengikut penyata akaun tersebut, bayaran terakhir yang dibuat oleh saya adalah RM 10,000-00 yang dibuat pada 26-12-2003, manakala tindakan ini telah difail pada tahun ini, iaitu lebih kurang 14 tahun selepas tarikh tersebut, maka tindakan ini telah pun dihalang oleh had masa;

[13] The court is of the opinion that the cause of action accrued on 12 August 2015 (which is the date of the Form 16D) and not from the date

when the defendant first defaulted in servicing the bank loan let alone from the last date the defendant had paid his last instalment. Hence the 12 years period has not been exceeded.

[14] The case of *Perwira Affin Bank Bhd v Lim Weow* [1998] 3 MLJ 56; [1998] 4 CLJ 17 is referred whereby the Court of Appeal has unanimously decided that:

> [3] *'The right to receive the money accrued' in s 21(1) of the Act must refer to the time when the respondent defaulted in her obligations to make payment after being served with the Form 16E notice*. The notice was served on the respondent on 2 November 1979 and the respondent had one month from that date within which to make payment (one month plus twelve years from 2 November 1979 would be 1 December 1991.) It was not clear from the appeal records when the foreclosure proceedings were instituted in court but even taking the first order for sale that was made on 2 June 1981, it was clear that limitation had not set in as to render the first order for sale unenforceable.

[15] The latest precedent of *Jigarlal K Doshi @ Jigarlal a/l Kantilal Doshi v Resolution Alliance Sdn Bhd and another appeal* [2013] 3 MLJ 61; [2012] 1 LNS 811 *in which the foreclosure proceeding was initiated 15 years of there being a default* further supports this view whereby the Court of Appeal has made reference to the case precedent of *Peh Lai Huat v MBf Finance Bhd* [2011] 3 MLJ 470; [2009] 5 CLJ 69 and has unanimously decided that:

> [20] *The court holds that the appellant's contention that there is 'cause to the contrary' when the respondent failed to file an action against the appellant after seven days from his default on the loan, to be without merit. The law is clear that the cause of action by a chargor does not accrue from the date of default of repayment of the loan but instead from the time the chargor fails to remedy the default as specified in the Form 16D Notice*.
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> In *Peh Lai Huat v MBf Finance Bhd* [2011] 3 MLJ 470; [2009] 5 CLJ 69 *the Court of Appeal stated at p 473 (MLJ); p 73 (CLJ) that:*
>
> > *... the right to exercise the statutory remedy of an order for sale did not arise until after the appellant had failed to remedy the default specified in the Form 16D notice*.
>
> [21] *Peh Lai Huat, a decision of the Court of Appeal has not been reversed by the Federal Court and thus remains good law. There is also no conflicting decision of the Court of Appeal which is inconsistent with Peh Lai Huat*.

[16] The learned High Court judge in the case of *Southeast Asia Special Asset Management Berhad v Latchamanan a/l Sinnakannoo* [2017] MLJU 533; [2017] 1 LNS 1171 has also referred to said Court of Appeal decision by deciding that:

> [22] I turn now to the issue of limitation. In so far as the issue of limitation is concerned, *I find myself bound by the decision of the Court of Appeal in Jigarlal K Doshi @ Jigarlal a/l Kantilal Doshi v Resolution Alliance Sdn Bhd and another appeal* [2013] 3 MLJ 61 ('*Jigarlal*'s case') *where it was held that time runs from the expiry of 30 day*

notice period under the Form 16D regardless of the fact that it may have been more than 12 years from the date of the default under the loan facility.

[17] This court accepts the facts that has been clearly stated in the plaintiff's affidavit in reply duly affirmed on 14 November 2017, in particular paras 18–27 which are reproduced here that goes to explain that there was no settlement made by the defendant:

18. Memandangkan Defendan telah mengemukakan permohonan untuk satu penyelesaian melalui surat Defendan bertarikh 15/7/2002, Plaintif telah melalui surat bertarikh 7/10/2002 mengarahkan peguamcaranya, Tetuan Kumar & Co, untuk menundakan tindakan undang-undang buat sementara waktu di bawah Saman Pemula No 31-191-87.

Sesalinan surat Plaintif kepada peguamcaranya, Tetuan Kumar & Co, bertarikh 7/10/2002 adalah dilampirkan di sini dan ditandakan sebagai Ekshibit 'BYL-4'.

19. Selepas meneliti permohonan Defendan yang tersebut di atas, saya dengan sesungguhnya menyatakan bahawa Plaintif telah meluluskan permohonan Defendan tersebut melalui surat Plaintif yang bertarikh 17/10/2002. Saya juga dengan sesungguhnya menyatakan bahawa kelulusan tersebut adalah tertakluk kepada penyempurnaan kesemua terma-terma dan syarat-syarat Plaintif oleh Defendan. Sesalinan surat Plaintif bertarikh 17/10/2002 adalah dilampirkan di sini dan ditandakan sebagai Ekshibit 'BYL-5'.

20. Saya dengan sesungguhnya menyatakan bahawa pada setiap masa yang matan, jumlah penyelesaian yang dipersetujui pada masa tersebut, iaitu pada masa perundingan untuk mencapai satu penyelesaian, adalah RM233,000.00 dan bukan RM200,000.00 sepertimana yang didakwa oleh Defendan. oleh itu, saya dengan sesungguhnya menafikan pengataan-pengataan Defendan. yang mengatakan bahawa satu penyelesaian telah dicapai untuk pembayaran yang sedikit kurang daripada RM200,000.00.

21. Saya juga dengan sesungguhnya menyatakan bahawa pada setiap masa yang matan, Encik SP Annamalai tidak pernah berunding dengan Plaintif untuk mencapai apa-apa penyelesaian bagi pihak Defendan apatah lagi satu perundingan penyelesaian yang kononnya kurang daripada RM200,000.00 sebagai penyelesaian penuh seperti yang didakwa oleh Defendan.

22. Walaupun satu penyelesaian telah dicapai diantara Plaintif dan Defendan melalui surat Plaintif yang bertarikh 17/10/2002, saya dengan sesungguhnya menyatakan bahawa Defendan telah memungkiri kesemua terma-terma dan syarat-syarat yang terkandung dalam surat tersebut. oleh itu, Plaintif telah mengarahkan peguamcaranya, Tetuan Kumar & Co, untuk meneruskan tindakan undang-undang di bawah Saman Pemula No 31-191-87 dimana satu perintah lelongan telah diberikan pada 1711212002 dengan menetapkan satu tarikh lelongan awam pada 51312003.

Sesalinan Perintah bertarikh 17/12/2002 adalah dilampirkan di sini dan ditandakan sebagai Ekshibit 'BYL-6'.

23. Oleh kerana satu tarikh lelongan telah ditetapkan oleh Mahkamah Tinggi Pulau Pinang pada 5/3/2003, saya dengan sesungguhnya menyatakan bahawa Defendan

telah membuat satu pembayaran sebanyak RM10,000.00 melalui Bumiputra Commerce Bank Berhad Cek No 624772 bertarikh 28/2/2003 kepada Plaintif dimana jumlah tersebut telah dikreditkan ke dalam akaun pinjaman perumahan Defendan pada 10/3/2003. Walaupun pembayaran tersebut adalah tidak memadai dengan terma-terma dan syarat-syarat penyelesaian Plaintif yang bertarikh 17/10/2002, Plaintif telah menghentikan tindakan undang-undang lelongan awam yang telah ditetapkan pada 5/3/2003.

24. Walaupun Defendan mempunyai pengetahuan yang sepenuhnya mengenai ketidakpatuhan kepada kesemua terma-terma dan syarat-syarat penyelesaian Plaintif sepertimana yang dinyatakan di Perenggan 22 dan Perenggan 23 di atas, saya dengan sesungguhnya menyatakan bahawa Defendan telah dengan sewenang-wenangnya, melalui surat bertarikh 22/10/2010 yang telah ditujukan kepada Plaintif, membuat alegasi-alegasi bahawa Defendan telah menyelesaikan jumlah yang terhutang oleh Defendan kepada Plaintif dan telah juga mengarahkan Plaintif untuk melepaskan gadaian Plaintif yang telah didaftarkan pada 18/9/1984 daripada hartanah tersebut.

25. Saya dengan sesungguhnya menyatakan bahawa Defendan juga telah, dengan sewenang-wenangnya, mengeluarkan sepucuk surat bertarikh 4/7/2011 yang telah ditujukan kepada Bank Negara, membuat aduan-aduan yang palsu terhadap Plaintif.

Salinan-salinan surat bertarikh 22/10/2012 dan 4/7/2011 masing-masing adalah dilampirkan di sini dan ditandakan sebagai Ekshibit 'BYL-7'.

26. Saya dengan sesungguhnya menyatakan bahawa Plaintif telah mengeluarkan surat bertarikh 18/5/2011 serta surat bertarikh 10/8/2011 yang ditujukan kepada Defendan untuk menyangkal alegasi-alegasi serta dakwaan-dakwaan palsu tersebut di atas yang telah dibuat terhadap Plaintif oleh Defendan.

Salinan-salinan surat bertarikh 18/5/2011 dan 10/8/2011 masing-masing adalah dilampirkan di sini dan ditandakan sebagai Ekshibit 'BYL-81'

27. Merujuk kepada Perenggan 15 (g) sehingga (k) Afidavit Sokongan tersebut, saya telah dinasihati oleh peguamcara Plaintif dan dengan sesungguhnya menyatakan bahawa sesalinan Notis Tuntutan bertarikh 6/3/2014 telah dikeluarkan oleh peguamcara Plaintif kepada Defendan atas arahan Plaintif memandangkan Defendan telah gagal untuk mematuhi dengan sepenuhnya dengan terma-terma dan syarat-syarat yang terkandung dalam surat penyelesaian bertarikh 17/10/2002 Walaupun Defendan telah membuat satu pembayaran sebanyak RM10,000.00 melalui Bumiputra Commerce Bank Berhad cek No 624772 bertarikh 28/2/2003 kepada Plaintif dimana jumlah tersebut telah dikreditkan ke dalam akaun pinjaman perumahan Defendan pada 10/3/2003.

[18] It is clear that due to the reason there was a settlement proposal being proposed by the defendant of which the plaintiff has accepted. However, it is also crystal clear that, the defendant, without denying to those facts, has failed to comply strictly with the terms and conditions of the said settlement proposal.

A Only upon being threatened with an auction date which was fixed on 5 March 2003, the defendant had made the payment of RM10,000 to the plaintiff to which the plaintiff has stopped the said auction and also the said foreclosure proceeding despite failure on the defendant's part to comply with the terms and conditions of the said settlement proposal.

B

Whether purported wrongful calculation of interest is relevant

[19] The argument put forward by the defendant in his defendant's affidavit in support, in particular para 16 which isreproduced here in its original C language, is baseless and without merit.

> 16. Bagaimana jua pun, saya menafikan kandungan dan pengiraan yang dibuat di dalam penyata akaun tersebut dan menegaskan bahawa terdapat kesilapan ternyata (*manifest error*) di situ termasuk yang berikut:
>
> D (a) Wang pokok pinjaman sebanyak RM192,000-00 yang dibenarkan kepada saya telah dilepaskan pada bulan September 1984 manakala penyata akaun tersebut menunjuk baki pembukaan (*opening balance*) sebagai RM222,565-29 setakat tarikh 02-08-1990;
>
> E (b) Maka, ianya adalah jelas bahawa penyata akaun tersebut langsung tidak mengambil kira bayaran yang dibuat oleh saya dalam tempoh di antara 1984 hingga Ogas 1990 dan bagaimana Plaintif telah mencapai jumlah RM222,565-29 tersebut tidak diketahui;
>
> (c) Kadar faedah yang digunakan untuk mengenakan faedah tidak disebut di F situ.
>
> (d) Faedah telah dipermodalkan berdasar bulanan manakala Klausa 1, Lampiran tersebut mempuruntukkan untuk mempermodalkan berdasar tahunan.
>
> G (e) Penalti telah dikenakan di dalam penyata akaun tersebut manakala tiada peruntukkan di dalam Lampiran untuk mengenakannya.
>
> (f) Bagaimana jua pun, kadar penalti yang dikenakan tidak dinyatakan di situ.

H **[20]** It is settled law that any categories which are not within the restrictive categories of 'cause to the contrary' as laid out in the case of *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 should not be taken into consideration by this honourable court.

I **[21]** This court again finds guidance in the case of *Jigarlal K Doshi @ Jigarlal a/l Kantilal Doshi v Resolution Alliance Sdn Bhd and another appeal* [2013] 3 MLJ 61; [2012] 1 LNS 811 whereby the the Court of Appeal has unanimously decided that:

(2) In a foreclosure action, claims of inter alia alleged breaches of contractual obligations or challenges on the calculation of interest under the loan agreement are not relevant. The court will only be concerned with the restrictive categories of 'cause to the contrary' as laid out in the case of *Low Lee Lian*. The alleged breaches separate civil suit.

Whether there was a breach of O 7 r 3(1) of the Rules of Court 2012

[22] This court finds that the argument averred by the defendant in his defendant's affidavit in support, in particular para 10 which is reproduced below in its original language is without merit.

10. Seterusnya saya dinasihati oleh peguamcara saya dan sesungguhnya mempercayai bahawa Saman Pemula tersebut harus dibatalkan dengan kos tanpa meneliti merit perkara ini atas alasan-alasan berikut:

(a) Dalam memungkiri Aturan 7 Kaedah 3(1), KKM 2012, di dalam Saman Pemula tersebut Plaintif telah gagal menyatakan atau memberi butir-butir untuk menentukan kausa atau kausa tindakan menurut yang mana Plaintif telah memohon untuk perintah jualan di dalam ini.

(b) Selanjutnya adalah jelas bahawa apabila Saman Pemula tersebut difailkan pada 3-7-2017, ianya tidak difailkan serta dengan Afidavit Sokongan tersebut yang diikrakan pada 18-8-2017.

(c) Dalam keadaan demikian, adalah jelas bahawa Saman Pemula tersebut telah difailkan tanpa sebarang butir-butir seperti diperlukan di bawah Aturan 7 Kaedah 3(1), KKM 2012 tersebut, maka, ianya harus dibatalkan dengan kos tanpa meneliti merit perkara ini.

[23] This court is of the considerated opinion that the plaintiff has fulfilled the requirements enunciated in O 7 r 3(1) of the Rules of Court 2012 to which the plaintiff has sufficiently identified the cause of action and also the relief or remedy which the plaintiff is seeking before this honourable court.

[24] It was also never a statutory requirement for the plaintiff in a foreclosure proceeding pursuant to O 83 r 2 of the Rules of Court 2012 for the originating summons to be filed together with the affidavit in support. What was required by the aforesaid order, in particular r 2(2), is to serve on the defendant a copy of the sealed originating summons and a copy of the affidavit in support not less than four clear days before the day is fixed for hearing.

[25] Even O 28 r 3C of the Rules of Court 2012 only requires the plaintiff to file the affidavit in support and serve a copy thereof on the defendant not later than seven days after the service of the originating summons. In any event, the sealed originating summons and affidavit in support was served on the defendant which has seen compliance with O 83 r 3 of the Rules of Court 2012.

[26] It will be an afterthought for the defendant to allege that the defendant has no knowledge or even do not understand the reasons behind this order for sale when the defendant himself has extensively listed the grounds, which the defendant avers to be sufficient, to defeat the order for sale which has been granted in favour of the plaintiff.

[27] The curative powers of this High Court under O 2 r 1 of the Rules of Court 2012 would also be applicable for any non-compliance. The case law of *Chain Cycle Sdn Bhd v Government of Malaysia* [2015] 9 MLJ 214; [2014] 10 CLJ 196 wherein the High Court has decided that:

> [102] *The defendant made the preliminary point that the plaintiff did not specify which limb of s 37 that it was relying on, and that accordingly the plaintiff's application should not succeed. Order 7 r 2(1A) of the Rules of Court 2012 requires an originating summons to state in its intitulement the provision of the written law under which the application to court is being made*. Similarly, O 69 r 4(1)(d) requires an originating summon for an arbitration claim to specify the section of the Arbitration Act 2005 under which the claim is made.
>
> he defendant cited *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporation Sdn Bhd* [2009] MLJU 0793; [2010] 5 CLJ 83, at p 99 in support of its position, where Hamid Sultan Abu Backer JC (as His Lordship then was) said:
>
> > It is a condition precedent, when a party relies on any of the sub-section under s 37 of the AA 2005 there is a duty and obligation in law to clearly identify the sub-section, set out the facts leading to the grounds which is recognised in the said section. This was not done in the instant case. The averments in the affidavits are all lumped up unintelligibly paving the path to prolixity. Prolixity is not condoned by courts.
>
> [104] *A wrong intitulement in a summons renders the summons irregular* (see *Voon Nam Kwong & Anor v Selamat Maju Jaya Sdn Bhd* [2002] MLJU 96; [2002] 6 CLJ 453). *An irregularity is subject to the curative powers of the court under O 2 r 1 of the Rules of Court 2012.*
>
> [105] *In the present instance, the plaintiff specified breach of natural justice in the grounds of the originating summons, and the affidavit in reply affirmed on 6 December 2013 by an employee of the defendant made it clear that the defendant also understood the issue. This case in my view book-ends the opposite end of the spectrum from the Taman Bandar Masai Baru case. I consider that, having regard to the substantial merits of the present case and the interests of justice, this is an appropriate instance for the exercise of the curative powers of this court under O 2 r 1 of the Rules of Court 2012.*

Whether there was a short service of four clear days pursuant to O 83 r 3 of the Rules of Court 2012

[28] This court is of the considered opinion that the argument forwarded by the defendant in his defendant's affidavit in support, in particular para 9, is without merit. The same is reproduced in the original language:

9. Saya dinasihati oleh peguamcara saya tersebut dan sesungguhnya mempercayai bahawa Jualan Perintah tersebut harus diketepikan secara *ex debito justitae* dengan kos atas alasan-alasan berikut:

(a) Perintah Jualan tersebut telah diberi oleh Tuan Timbalan Pendaftar yang tidak mempunyai bidang kuasa untuk memberi Perintah Jualan tersebut.

(b) Penyerahan Kertas-Kertas Kausa tersebut merupakan satu penyerahan singkat sebelum Perintah Jualan tersebut diperolehi atas alasan-alasan seperti diterangkan di bawah ini.

(i) Menurut Aturan 83, Kaedah 1(2), KKM 2012, Plaintif hendaklah menyerah Kertas-Kerta Kausa 4 hari lapang (*4 clear days*) sebelum tarikh perbicaraan Saman Pemula yang ditetapkan pada 5-9-2017

(ii) Manakala, menurut Sampul surat tersebut adalah jelas bahawa Kertas Kausa tersebut telah diposkan hanya pada 25-8-2017, iaitu pada hari Jumaat dan ianya diterima oleh saya hanya pada 5-9-2017.

(iii) Maka, Perintah Jualan telah melanggari Aturan 83, Kaedah 1(2), KKM dan atas alasan ini sahaja, Peritah Jualan harus diketepikan secara *ex debito justitae*.

(iv) Bagaimana jua pun, hari-hari berikut adalah cuti am, iaitu

(1) 26-08-2017 dan 27-08-2017 adalah hari Sabtu dan Ahad;

(2) 31-08-2017 adalah Hari Kemeredaan (hari Khamis)

(3) 01-09-2017 adalah Hari Raya Haji (hari Jumaat);

(4) 02-09-2017 dan 03-09-2017 adalah hari Sabtu dan Ahad;

(5) 04-09-2017 adalah hari cuti kelepasan khas sebab memenangi Sukan SEA

(v) Dalam keadaan demikian, hanya 3 hari lapang (iaitu 28-08-2017, 29-08-2017 dan 30-08-2017) diberi sebelum Perintah Jualan dirakamkan pada 05-09-2017 dan ini telah melanggari Aturan 83, Kaedah 1(2), KKM 2012 dan atas alasan ini pun, Peritah Jualan harus diketepikan secara ex debito justitae.

(vi) Tambahannya, menurut s 431(1), Kanun Tanah Negara 1956 dan/atau Klausa 2, Lampiran kepada Gadaian yang dilampirkan sebagai Ekshibit 'C' di dalam Afidavit Sokngan tersebut, sebarang notis yang dihantar melalui pos berdaftar akan dianggap diterima dalam urusan pos yang biasa. Memandangkan Kertas-Kertas Kausa diposkan pada 25-08-2017 (hari Jumaat) dan memandangkan 26-08-2017 dan 27-08-2017 (hari Sabtu and Ahad) merupakan hari cuti am, Kertas-Kertas Kausa hanya boleh dianggap diterima oleh saya pada 29-08-2017 (hari Selasa) atau 30-08-2017 (hari Rabu). Ini bermakna tiada hari lapang atau hanya 1 hari lapang diberi kepada saya sebelum Perintah Jualan dirakamkan pada 05-09-2017.

(vii) Dalam keadaan demikian, Perintah Jualan tersebut harus diketepikan

secara *ex debito justitae.*

[29] It is clear from the facts that the plaintiff has served the sealed originating summons and affidavit in support on the defendant via registered post on 25 August 2017 at the defendant's address (BYL1 the plaintiff's affidavit in reply) which is the same address stated and mentioned in all of the defendant's affidavits filed herein.

[30] It is also clear that the said service was perfected in accordance with the terms and conditions stipulated in the charge and annexure made between the plaintiff and the defendant (BYL1 the plaintiff's affidavit in reply) pursuant to O 10 r 3 of the Rules of Court 2012 and the aforesaid service shall be deemed perfected.

[31] In computing the four clear days rule stipulated under O 83 r 2 of the Rules of Court, only the weekly holiday (Sunday) shall be excluded. As to whether a Saturday is a weekly holiday, the court finds that it is not a weekly holiday. Support for this finding is found in s 2 of the Holidays Act 1951 which has clearly stipulated that:

> In this Act, unless the context otherwise requires —
>
> 'Minister' means the Minister charged with the responsibility for public and bank holidays;
>
> 'Peninsular Malaysia' has the meaning assigned thereto in section 3 of the Interpretation Acts 1948 and 1967 [Act 388], nd includes the Federal Territory.
>
> *'weekly holiday' means Sunday or, in States where Friday is observed as the weekly holiday, Friday*;

[32] Section 3 of the Interpretation Acts 1948 and 1967 has also clearly stipulated that:

> *'weekly holiday' means Sunday or, in a State where Friday is observed as the weekly holiday, Friday*;

[33] The case of *Aje Best-On Sdn Bhd v Ahmad bin Omar & Anor* [2000] 4 MLJ 600; [2000] 3 CLJ 515 is referred whereby the High Court judge has decided that:

> It is relevant therefore now to consider O 3 r 2(5) of the RHC which reads as follows:
>
> (5) Where, apart from this paragraph, the period in question, being a period of seven days or less, would include the day before the weekly holiday, the weekly holiday or public holiday, that day shall be excluded.
>
> Section 54(1)(b) of the Interpretation Act 1948 ('the Act') is also relevant. It reads

as follows:

> 54 Computation of time.
>
> (1) In computing time for the purposes of any written law:
>
> (b) if the last day of the period is a weekly holiday or a public holiday (referred to in this sub-section as excluded days) the period shall include the next following day which is not an excluded day;

Therefore, it is clear from these two authoritative guidelines that since the last date for filing the notice of appeal falls on the 11th being a Sunday, then I shall have to, pursuant to O 3 r 2(5) of the RHC, exclude the 11th from the computation and pursuant to s 54(1)(b) of the Act, include the next following day into the computation of the days to be counted for filing the notice of appeal. This means that the last day for filing the notice of appeal was 12 April 1999. Since the notice was filed on 13 April 1999, it is out of time.

Counsel for the appellant argued that pursuant to O 3 r 2(5) of the RHC, I should, in computing the days, also exclude 'the day before the weekly holiday'. In other words, he wanted me to exclude the 10th day of April which was a Saturday from the computation. If he is correct in his submission then clearly he is on time when he filed the notice of appeal on 13 April. But that is not how this sub-r (5) is to be interpreted. *Where the period to be calculated would include the day before the weekly holiday, then in computing the required number of days so long as it is seven days or less, the court ought not to exclude in its calculation, that day before the weekly holiday. In other words, in so far as this case is concerned, the court ought to include the Saturday in its calculation and which means that the required five days would end on Monday, 12 April 1999*.

[34] Upon that premise, the court finds that the service of the plaintiff's originating summons and affidavit in support on the defendant is well within the four clear days rules since service was carried out/perfected on 25 August 2017 (Friday) with the order for sale being obtained on 5 September 2017, hence the calculation of four clear days shall start to run from 26 August 2017 (Saturday), 28 August 2017 (Monday), 29 August 2017 (Tuesday), 30 August 2017 (Wednesday) and 2 September 2017 (Saturday). Two Sundays being 27 August 2017 and 3 September 2017, 31 August 2018 (National Day), 1 September 2017 (Hari Raya Haji) and 4 September 2017 (SEA Games winning holiday) being excluded from calculation.

[35] Pursuant to s 12 of the Interpretation Acts 1948 and 1967, it is trite law that once a service was done by way of postal service (as in this case by way of registered post which is in accordance with the terms and conditions stipulated in the charge and annexure made between the plaintiff and the defendant), there shall be a presumption under the aforesaid section that the service has been perfected.

[36] The case of *MBf Finance Berhad v Tiong Kieng Seng* [2001] MLJU 405;

A [2001] 4 CLJ 38 wherein the learned High Court judge has decided that:

> There is a fundamental difference between personal service and postal service — actual physical delivery is of the essence in the former whilst compliance with stipulated rules will suffice in the latter, which will thereafter invite the presumption under s 12 of the Interpretation Acts 1948 and 1967 that service has been effected.

B

[37] This court's attention is further drawn to the undisputed fact pertaining to the service of the sealed order for sale on the defendant. *It is an undisputed fact that the service was carried out/perfected on 2 October 2017 on the defendant, at the same address enunciated in all of the defendant's affidavits filed by the defendant herein, to which the defendant himself admitted to accepting the said service on 3 October 2017 (BYL2 the plaintiff's affidavit in reply)*.

C

[38] Having had the aforesaid facts tabled before this honourable court, an inference could be drawn from this, that is, the sealed originating summons and affidavit in support which was served on the defendant via registered post on 25 August 2017 at the defendant's address (which is the same address enunciated in all of the defendant's affidavits filed by the defendant here) must have been received by the defendant not later than 28 August 2017, hence would definitely comply with the four days requirement as has been calculated above.

D

E

CONCLUSION

[39] This court is satisfied that that the defendant has failed to demonstrate any cause to the contrary as stipulated in s 256(3) of the National Land Code and the defendant's complaints under enclosure 6 fail to show that they fall within any of the categories of 'cause to the contrary' as explained by the supreme court in the case of *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77.

F

G

[40] Based on those observations and deliberations, this court decides to dismiss the defendant's application with costs of RM3,000.

H *Application dismissed with costs of RM3,000.*

Reported by Izzat Fauzan

I